Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1265

ALLEN J. ZIMMER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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SUPREME COURT OF THE UNITED STATES

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No. .....

ALLEN J. ZIMMER,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Your Petitioner, Allen J. Zimmer, respectfully prays to the Honorable Court that a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit to review judgment of that Court on February 11, 1975, affirming an opinion and judgment of the United States District Court for the Southern Division of the Western District of Missouri rendered on October 25, 1974. Petition for rehearing was denied on March 6, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not reported. A copy of the Order of Affirmance is attached to this petition and may be found in Appendix (A-1). The order of the District Court for the Southern Division of the Western Judicial District of Missouri affirming the conviction imposed by the Magistrate may be found in Appendix (A-3). A copy of the Order Denying Petitioner's Motion for Rehearing is attached and may be found in Appendix (A-6).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit affirming the judgment of the District Court made on February 11, 1975 was filed and entered February 14, 1975. The order of the United States Court of Appeals denying rehearing en banc or for rehearing was made and entered on March 6, 1975. Mandate issued on March 7, 1975.

The decision of the United States Court of Appeals for the Eighth Circuit presents a novel question as to the interpretation of Rule 11 of Federal Rules of Criminal Procedure.

The decision of the United States Court of Appeals for the Eighth Circuit is probably not in accord with the applicable decisions of the Supreme Court of the United States.

The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of other Court of Appeals on the same matter.

The jurisdiction of the Supreme Court of the United States is invoked under 28 USCA 1254 (1). This petition is presented under and pursuant to the Federal Rules of Criminal Procedure and Rule 19-1 (a) and (b) of the Supreme Court of the United States.

This petition is accompanied by a copy of the opinion and judgment of the United States District Court for the Southern Division of the Western District of Missouri affirming conviction of petitioner by the United States Magistrate (A-3), copy of order of United States Court of Appeals for Eighth Circuit affirming United States District Court of Missouri (A-1) and copy of Order of United States Court of Appeals for Eighth Circuit Denying Petition for Rehearing (A-6) and certified copy of record of all proceedings in the Circuit Court of Appeals will be forwarded by the Clerk of the Circuit Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

1. Does the opinion of the United States Court of Appeals for the Eighth Circuit present novel and serious questions as to the interpretation of Rule 11 of Federal Rules of Criminal Procedure?

2. Is the decision of the United States Court of Appeals for the Eighth Circuit probably not in accord with the applicable decision of the Supreme Court of the United States?

3. Has the Court of Appeals for the Eighth Circuit rendered an opinion in conflict with the decision of other Court of Appeals on the same matter?

STATUTORY PROVISIONS INVOLVED

Rule 11 of Federal Rules of Criminal Procedure provides:

"Rule 11, Pleas—A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The

court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. (As amended effective July 1, 1966.)"

Vernon's Annotated Missouri Statutes, Volume 15-B, Page 339, Section 304.010 provides in pertinent part: (Verbatim Text A-16)

"Every person operating a motor vehicle on the highways of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person and shall exercise the highest degree of care."

Paragraphs 2, 3, 4, 5 and 6 make provisions for the speed limit and paragraph 7 provides that any person violating this section is guilty of a misdemeanor.

Vernon's Annotated Missouri Statutes, Volume 16, Page 201, Section 304.570 provides:

"any person who violates any of the provisions of this chapter or of sections or section 307.020 to 307.295, R.S. Mo. for which no specific punishment is provided, upon conviction thereof, shall be punished by a fine of not less than five dollars ($5.00) or more than five hundred dollars ($500) or by imprisonment in the county jail for a term not exceeding one year, or both such fine and imprisonment." (R.S. 1939 8404. Amended by L. 1949 S.B.No. 1113; L. 1961 p. 496 1)"

STATEMENT OF THE CASE

This is an appeal from the petitioner's conviction upon his guilty plea to the offense of careless and imprudent driving in violation of 18 U.S.C. Section 13 and V.A.M.S. Section 304.010.

Petitioner was apprehended by the military police at Ft. Leonard Wood, Missouri on June 24, 1974. According to the statement of the arresting officer he stopped the petitioner, Allen J. Zimmer, at 0055 hours for swaying from side to side and smelled odor of alcohol on Zimmer's breath (A-12). Petitioner Zimmer was given a breathalyzer test and his blood alcohol count was .08% (A-14).

On July 29, 1974, Zimmer appeared with his counsel before the Assistant United States Attorney and since it was Zimmer's first offense and the breathalyzer indicated a low blood alcohol content the Assistant United States Attorney agreed to reduce the charge to careless and imprudent driving. Petitioner, his attorney and the Assistant United States Attorney appeared before the Magistrate and explained that the charge had been reduced to careless and imprudent driving. The Magistrate informed the Assistant United States Attorney to prepare an amended information. The Court reconvened after a few minutes and the amended information was given to Zimmer's counsel and his counsel told Zimmer to plead to the reduced charge as the fine would probably not exceed $50 but the Assistant United States Attorney could make no recommendations as to the amount of the fine.

The petitioner was brought before the Magistrate who informed the petitioner of what he was charged and explained to the defendant his Constitutional rights to trial by jury, confrontation of witnesses, etc. Petitioner signed waiver and he understood with what he was charged. The Magistrate then

informed petitioner that maximum possible punishment was $1000 fine or one year imprisonment, or both (Appendix D, A-9). The petitioner admitted he crossed a designated center line and further understood that the Magistrate was not bound by any recommendations.

Petitioner was fined $300 and 20 days imprisonment. The imprisonment was suspended and petitioner was placed on probation for a period of three months with the provision that the fine be paid on or before November 15, 1974. Execution was stayed for 30 days, and it was provided that, upon payment on the fine in satisfaction of the special condition of probation, the order of probation would be automatically vacated, set aside, and held for naught, and the petitioner discharged.

Notice of Appeal was filed in the United States District Court who on October 25, 1974 affirmed the conviction and sentence imposed by the Magistrate and specifically held that the Magistrate carefully and explicitly explained the maximum punishment, that there was a factual basis for the guilty plea as required by Rule 11, and that the sentence did not constitute an abuse of discretion by the Magistrate (A-3).

Timely appeal was filed in the United States Court of Appeals for the Eighth Circuit who affirmed the judgment of the District Court and held that petitioner's appeal is wholly lacking in merit on February 14, 1975 (A. 1).

Petition for rehearing and suggestion for rehearing en banc were denied on March 6, 1975 (A-6). Mandate issued March 19, 1975.

REASONS FOR GRANTING THE WRIT

I. The opinion of the United States Court of Appeals for the Eighth Circuit presents a novel question as to the interpretation of Rule 11 of Federal Rules of Criminal Procedure.

II. The decision of the United States Court of Appeals for the Eighth Circuit is probably not in accord with the applicable decision of the Supreme Court of the United States.

III. The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

ARGUMENT

I

The Opinion of the United States Court of Appeals for the Eighth Circuit Presents a Novel Question as to the Interpretation of Rule 11 of the Federal Rules of Criminal Procedure.

The Court of Appeals for the Eighth Circuit in affirming the judgment of the District Court improperly interpreted Rule 11 of the Federal Rule of Criminal Procedure that provides as follows:

> "Rule 11. Pleas—A defendant may plead not guilty, guilty or with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

> The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. (As amended, effective July 1, 1966.)"

The Petitioner contends that the Court of Appeals are in fact holding that a plea is voluntarily and understandingly made when the defendant is mistakenly informed by the Magistrate as to the maximum punishment and when there is insufficient factual basis to support the plea.

There can be no question that the maximum punishment under Vernon's Annotated Missouri Statutes, Section 304.010 (A-16) is prescribed by Vernon's Annotated Missouri Statutes, Section 304.570, supra, that provides for a fine of not less than $5.00 or more than $500.00 or by imprisonment in the county jail for 1 year, or both fine and imprisonment.

Although the Supreme Court of Missouri has not been required to interpret the meaning of Section 304.570, the St. Louis Court of Appeals in *State v. Ball*, 171 S.W. 2d 787 held that statutes should not be construed so as to lead to absurd results if they are susceptible to reasonable interpretation. It is manifest that Section 304.010 doesn't provide any specific punishment but does provide that its violation is a misdemeanor. Since Section 304.570 clearly states that any person who violates any of the provisions of this chapter for which no specific punishment is provided . . . shall be punished by a fine of not less than $5.00 or more than $500 or by imprisonment in the county jail for a term not exceeding one year or by both fine and imprisonment it is cogent that the maximum fine is $500 or 1 year in the county jail.

Petitioner asserts that the intent of the legislature is manifest and further states that even if the statutes could possibly be considered ambiguous any doubt should be resolved in favor of the petitioner. A reading of Sections 304.010 and 304.570 leaves little doubt that the Magistrate misinformed the petitioner as to the maximum punishment.

The petitioner cannot be expected to voluntarily and intelligently enter a plea when misinformed by the Magistrate as to the maximum punishment.

The United States Court of Appeals in *Rudolfa Ruiz v. United States* (5th Cir.) (1974), 494 F. 2d 1, held that Rule 11 mandates that defendant be told of the possibility of sentencing and the minimum and maximum penalties.

This Court in *McCarthy v. United States* (1969), 394 U.S. 459, in an attempt to ease the conflicts among the different circuits stated,

> "that the nature of the inquiry required by Rule 11 must necessarily vary from case to case and as such no general guidelines are established other than those expressed in the rule itself."

In the instant case petitioner's guilty plea cannot be considered voluntarily and with understanding when he is misinformed by the Court as to the maximum punishment (A-9). The error is further compounded when petitioner is further misinformed by his own counsel that the expected range of punishment would be one-sixth of that which he received and there is no factual basis in record to support the guilty plea.

II

The Decision of the United States Court of Appeals for the Eighth Circuit Is Probably Not in Accord With the Applicable Decision of the Supreme Court of the United States.

This Court held in *McCarthy v. United States*, supra,

> "that the nature of Rule 11 must vary from case to case and as such no general guidelines are established other than those expressed in the rule itself."

> "The rule pertinently provides that the Court shall not accept a guilty plea without first addressing the defendant personally and determining that the plea is made voluntarily . . . and the Court shall not enter judgment upon a guilty plea unless there is a factual basis for the plea."

Petitioner contends that a plea cannot be voluntarily and with understanding when the accused is misinformed by the Court as to the maximum punishment by the Court and mislead by his own counsel as to the probable range of punishment, and when the record does not support a factual basis for the plea.

A review of Vernon's Annotated Missouri Statutes, Section 304.010 (A-16), a violation of which petitioner was charged, and Section 304.570, which sets out the penalty, clearly state that the maximum punishment is $500 rather than $1000. Petitioner was improperly informed by the Magistrate when told the maximum punishment was $1000 fine (P. 2 Transcript of Proceedings).

The United States District Court and the Eighth Circuit Court of Appeals, apparently agreed with appellee's statement that:

> "However, even if the Court should find that the conclusion of the Magistrate was erroneous it does not vitiate Rule 11 procedures utilized in this case."

Reasoning that since petitioner received a lesser sentence than either that which the law permitted or that which he was informed the Court could impose, his plea of guilty will not be set aside for lack of understanding of its consequences.

If it was the mere fact that the petitioner was misinformed by the Magistrate as to the maximum penalty alone that petitioner complains he would readily abandon his cause. However, the petitioner reads Rule 11 and United States v. McCarthy, supra, to mean that the requirement of Rule 11 must vary from case

to case, and not on one single item but on all the facts and circumstances.

In the instant case not only was the petitioner misinformed by the Magistrate of the maximum punishment. The petitioner's counsel informed petitioner that the normal range of punishment for careless and imprudent driving was from $25 to $50. That there were no aggravating circumstances such as property damage or injury to persons. That petitioner was a first offender. That petitioner was fined six times the normal range. That there was no factual basis in the record to indicate that the petitioner crossed over the designated center line, aside from the petitioner's admission on page 2 of the trial court transcript in answer to the question by the Magistrate if he did weave back and forth across a designated center line.

The military police report and the sworn statement (A-12) of the military policeman (A-15) do not indicate petitioner crossed a center line. While it is true that the transcript of the proceedings does not reveal that the petitioner when asked by the Magistrate if he crossed the center line turned to his counsel who whispered for him to plead guilty as the fine would only be $25 to $50, it is a fact, raised in defendant's memorandum trial brief and not specifically denied by the Magistrate or the Assistant United States Attorney.

There is nothing to indicate on what street petitioner was travelling or whether petitioner was travelling on a four lane highway with a separated grade, whether property of another or the life or limb of any person was endangered.

Certainly the court should have inquired relative to these important facts if courts are to strictly adhere to Rule 11 and be guided by matters of reality and not mere ritual.

In the instant case it would not have been an undue burden on the Magistrate to inquire of what street defendant was travelling, whether it was a four lane, what caused petitioner

to cross the center line, and whether any property was damaged or life endangered.

"The more meticously the rule is adhered to, the more it tends to discourage, or at least to enable the more expeditious disposition of the numerous and often frivolous attacks on the constitutional validity of guilty pleas." *McCarthy v. United States*, supra.

III

The Court of Appeals for the Eighth Circuit Has Rendered a Decision in Conflict With the Decision of Other Courts of Appeals on the Same Matter.

The Court of Appeals for the Fifth Circuit in *Rudolfa Ruiz v. United States*, supra, in attempting to follow the dictates of *United States v. McCarthy*, supra, failed to overturn a guilty plea when the defendant was not properly informed that he would be sentenced as a second offender because the record disclosed that he understood the maximum punishment awaiting him. The Court, however, did state it does not require disclosure of all information on the punishment authorized by the statute. It is only necessary that the defendant know the range of possible sentence, not the exact penalty the Court will assess. Rule 11 mandates only that the defendant be told of the possibility of sentencing under one of several provisions and the minimum and maximum penalties required by law.

Petitioner asserts that if Rule 11 mandates defendant be informed of the minimum and maximum punishment then *a fortiori* there is a more compelling duty on the Court not to misinform.

In the case of *United States v. Steele* (2nd Cir.), 413 F 2d 907 (1969), the Court of Appeals overturned a guilty plea when a defendant admitted he stole a typewriter. The defendant was represented by counsel when he entered his plea but

the Court held that the record needed more to support the guilty plea than the mere fact that the defendant stated that he stole the typewriter. The acts and intents of the particular defendant are necessarily to be inquired into, to determine if the plea is intelligently made.

Certainly both the bench and bar have equal duties and responsibilities and while it is not easy to admit error, integrity requires that if we are in error we at least should attempt to correct them. The law places many technical demands on the practitioner and Rule 11 requires meticulous and exact inquiries by members of the bench when taking guilty pleas. Matters of reality and not mere ritual should be controlling. Facts not assumptions should form the factual basis for the plea. These demands are not to protect the guilty but the innocent.

The Second Circuit Court of Appeals in *United States v. Steele*, supra, could easily have sustained the guilty plea by stating that the record revealed defendant admitted stealing a typewriter but they properly held that Rule 11 requires more of the trial Court than the mere admission that defendant stole a typewriter. Reality required ascertaining the acts and intent of the defendant to determine if the plea is intelligently made.

Wherefore, petitioner respectfully prays that Certiorari may be granted to properly interpret Rule 11 of Federal Rules of Criminal Procedure, resolve a conflict between the Eighth Circuit Court of Appeals and applicable decision of the Supreme Court of the United States and decision of the other Courts of Appeals on the same matter.

Respectfully submitted

CHARLES M. WESLEY
Box 412
Waynesville, Missouri
Attorney for Petitioner

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 74-1867

Allen J. Zimmer,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: February 11, 1975

Filed: February 14, 1975

Before Matthes, Senior Circuit Judge, Heaney and Webster, Circuit Judges.

ORDER OF AFFIRMANCE

Having duly considered the record and briefs in this case, the oral argument of retained counsel for appellant, and being fully informed in the premises, the court is of the opinion that

this appeal is wholly lacking in merit and, consequently, affirms the judgment of the district court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[Not to be printed or published]

APPENDIX B

In the United States District Court for the
Western District of Missouri
Southern Division

United States of America, Plaintiff,
vs.
Allen J. Zimmer, Defendant.
No. 74CR331-S

ORDER AFFIRMING CONVICTION

(Filed October 25, 1974)

This is an appeal from defendant's conviction upon his plea of guilty before the United States Magistrate of the offense of careless and imprudent driving in violation of 18 U.S.C. § 13 (1970), and Rev. Stat. Mo. § 304.010 (1969). Because the matters which may be challenged on appeal after a plea of guilty are limited, the Court, by order entered September 9, 1974, directed defendant to prepare and file a brief setting forth with specificity the issue or issues sought to be raised in this appeal and his points of legal authority in support thereof. The United States was given the opportunity to respond to defendant's brief. These briefs have now been filed with the Court.

On July 29, 1974, defendant appeared personally and by his retained counsel before the United States Magistrate at Ft. Leonard Wood, Missouri. At that time the defendant know-

ingly and voluntarily waived his right to trial before a federal district judge and jury and consented in writing to be tried by the United States Magistrate. Defendant was thereupon arraigned and entered a plea of guilty. The Magistrate sentenced defendant to pay a fine of $300 and to be committed to the Attorney General or his representative for a period of 20 days. Execution of the term of imprisonment was suspended and the defendant was placed on probation for a period of three months with the provision that if the fine were not paid before the order of probation became effective, it should be a special condition of probation that the fine be paid on or before November 15, 1974. Execution of the order of probation was stayed for a period of 30 days with the provision that upon payment of the fine in satisfaction of the special condition of probation, the order of probation would be automatically set aside.

Defendant raises essentially three matters in this appeal:

1. That there was no factual basis for the plea entered by the defendant as required by Rule 11, Fed. R. Crim. P.

2. That the plea was not made voluntarily with an understanding of the nature of the charge and the consequences of the plea as required by Rule 11, Fed. R. Crim. P.

3. The fine imposed by the magistrate was excessive in view of the normal fine for such an offense, as indicated by the Assistant United States Attorney.

The Court has examined the record herein, the briefs submitted by the parties and the Magistrate's excellent Memorandum Findings of Fact and Conclusions of Law and concludes that the conviction and sentence should be affirmed. The matters raised in points 1 and 2 above are not matters normally considered on appeal; rather, they would appear to be more cognizable in a motion pursuant to 28 U.S.C. § 2255 (1970).

However, because defendant is not a prisoner in federal custody, this appeal cannot be considered as a motion under section 2255. However, indulging in every inference in favor of defendant, the Court will consider the points raised by defendant's brief as if it was a section 2255 motion. The Court has read the transcript carefully. The Magistrate Judge carefully and explicitly explained to the defendant the maximum possible sentence, and, by defendant's affirmative responses, established the factual basis of the offense and the plea of guilty. Accordingly, we find and conclude that defendant was advised of the nature of the charge and the consequences of his plea, that the plea was supported by a factual basis as required by Rule 11, and that the sentence imposed did not constitute an abuse of discretion by the Magistrate. *See, Woosley v. United States*, 478 F.2d 138 (8th Cir. 1973).

It is therefore

Ordered that the conviction and sentence imposed herein be, and hereby are, affirmed; and it is

Ordered that the order staying execution of the sentence imposed herein be, and hereby is, dissolved.

WM. R. COLLINSON
District Judge

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

74-1867

September Term, 1974

The United States, Appellee, vs. Allen J. Zimmer, Appellant.		Appeal from the United States District Court for the Western District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 6, 1975

APPENDIX D

In the United States District Court for the
Western District of Missouri
Southern Division

United States of America, Plaintiff, v. Allen J. Zimmer, Defendant.		Criminal Action. No. 74CR331-S.

TRANSCRIPT OF PROCEEDINGS BEFORE UNITED STATES MAGISTRATE ON JULY 29, 1974

On this date the defendant appeared personally and by his retained counsel, Charles M. Wesley, Waynesville, Missouri, before the undersigned United States magistrate. The United States appeared by Donald R. Cooley, Assistant United States Attorney. Thereupon, the following proceedings were had:

United States Magistrate: This is United States v. Allen J. Zimmer, No. 74CR331-S. The information has been filed today, July 29, 1974, and the defendant is present personally by his retained counsel, Charles M. Wesley. The United States is present by Donald R. Cooley. The information charges that on or about July 24, 1974, at Fort Leonard Wood, Missouri, on lands within the exclusive jurisdiction of the United States in the Western District of Missouri, Allen J. Zimmer did operate a motor vehicle on public roads within the boundaries of said military reservation to-wit: in a careless and imprudent manner by

weaving back and forth across a designated center line of the public road on which he was traveling, all in violation of 18 United States Code, Section 13, and Vernon's Annotated Missouri Statutes, Section 304.010. You have the right not to make any statement and any statement made by you may be used against you in the prosecution of this case. You have the right to retain counsel, which you have done. You have the right to trial before a federal district judge and by a jury before that judge in which you have the right to attend and testify, or not testify, if you would like not to, and no adverse inference can be drawn from your failure or refusal to testify. You have the right to confront and cross-examine the witnesses and evidence that the government may present against you and the government bears the burden of proving your guilt beyond a reasonable doubt. You have the right to waive that right and consent to be tried by the United States Magistrate, sitting without a jury, in which case all of the same procedural rights attach, except the right to trial by a jury. The trial would be by me sitting without a jury. And if it is necessary to continue your case from today for some reason, you have the right to be admitted to bail upon such terms and conditions that will reasonably assure your appearance as required. Now, what is the choice of defendant and his counsel with respect to the right of trial by jury before a federal district judge?

Mr. Wesley: We waive that right.

United States Magistrate: I will hand the defendant and his counsel the written form of waiver of right to trial by jury before a federal district judge, which recites that I advised the defendant fully of such right and with full knowledge of it he has elected to waive it, and consented to be tried by the United States Magistrate. If that's the choice of the defendant, the defendant should execute it

on the line provided for his signature and his counsel should sign it as a witness.

United States Magistrate: All right, will you step up here. We will go ahead with the arraignment and plea in this case, since the defendant has executed the written form of right to trial by a jury before a federal district judge. Now, I have read the information to you. Do you understand what you are charged with in the information?

Mr. Zimmer: Yes, your Honor.

United States Magistrate: And if you are convicted on this charge, the maximum possible punishment is $1,000 fine or one year imprisonment, or both, do you understand that?

Mr. Zimmer: Yes.

United States Magistrate: How do you plead to the charge contained in the information?

Mr. Zimmer: Guilty.

United States Magistrate: Have you been the subject of any threat or promise to induce you to plead guilty?

Mr. Zimmer: No.

United States Magistrate: Has anybody told you that in way of punishment it will go easier for you if you pleaded guilty, rather than assert your right to trial and plead not guilty?

Mr. Zimmer: No.

United States Magistrate: And, do you recognize that, even though you have waived your right to trial by a jury before a federal district judge, if you did not plead guilty, you would still have the right to a full trial before me sitting without a jury, and that your guilty plea waives that right?

Mr. Zimmer: Yes.

United States Magistrate: And, are you pleading guilty because in fact you did on or about June 24, 1974, Fort Leonard Wood, operate a motor vehicle in a careless and imprudent manner by weaving back and forth across a designated center line on the public road on which you were traveling?

Mr. Zimmer: Yes.

United States Magistrate: All right, I will accept the guilty plea, and I will forego the ordering of a pre-sentence investigation, unless there is some objection to it by counsel or the defendant. Do you want to have a pre-sentence investigation made before I impose sentence in this case?

Mr. Zimmer: No.

United States Magistrate: Do you wish to make any statement in mitigation of punishment?

Mr. Zimmer: No.

United States Magistrate: Do you wish to make any statement?

Mr. Wesley: No, sir.

United States Magistrate: Do you wish to make any recommendation?

Mr. Cooley: No, sir.

United States Magistrate: Its the judgment and sentence of the court that the defendant be sentenced to pay a fine of $300 and be committed to the custody of the Attorney General or his authorized representative to serve 20 days' imprisonment, but the execution of so much of the sentence as provides for the 20 days' imprisonment is suspended, and the defendant is placed on probation for a period of 3 months. The commencement of the probationary period is stayed for a period of 30 days, at which time it will commence if the fine has not theretofore been

paid, and it will be a special condition of the probationary period, if it does commence, that the defendant pay the $300 fine on or before November 15, 1974. If any appeal is to be taken from the judgment and sentence of the court, a written notice of appeal must be filed with the clerk within 10 days.

MILITARY POLICE REPORT

THRU	TO	FROM
Cdr, 4th AIT Bde Fort Leonard Wood, Missouri	Cdr, 3rd Bn, 4th Bde, Fort Leonard Wood, Missouri	Provost Marshal Division, Fort Leonard Wood, Missouri

3 TYPE COMPLAINT: Driving While Intoxicated (18 USC RMMO 564.444)

4 LOCATION: [redacted]

8 COMPLAINT RECEIVED BY: Thomas T. Crose, SSG, Desk Sergeant

0055 74-06-24

10 NAME OF SUBJECT: [redacted]

9 HOME OF RECORD	9 PLACE OF BIRTH	9 DATE OF BIRTH
Albertville, Minn	Elkriver, Minn	11 Mar 51

COLOR HAIR	COLOR EYES	COMPLEXION	WEIGHT	HEIGHT
Brown	Blue	Light	180	5'10"

14 IDENTIFYING MARKS: None

15 PERSONS RELATED TO REPORT: [redacted], Douglas E. (SM)

17 PROPERTY DATA: NONE

17 DISPOSITION OF: Officer: MP Pm 629; Evidence: N/A

18 DETAILS OF REPORT (All persons listed in item 15 and witnesses (if original or reports)): See Reverse

NOTIFICATION: 1- DA Pm 2823; 1- MP Pm 1805; 1- B/A Checklist

DISTRIBUTION: 1- US Mag Crt; 1- Cdr, A-3-4; 1- USAMPCH, Ft Belvoir, Va.; 1- ATZT-PM-S; 1- File

FOR MILITARY POLICE USE ONLY

TYPED NAME, GRADE AND TITLE OF INVESTIGATING OFFICER: Henry H. Harwell, 21Z, MPC, Acting Asst S3

SIGNATURE: [redacted]

DISPOSITION	STATUS	CATEGORY	PROPERTY TYPE	WORKLOAD DATA
A Suspect B Witness C Complainant D Military Police E Commander F Other Authorities	A Army N Other Service C Civilian D DA Civilian F Contractor G Foreign Government H Foreign National	Other Sign J Other	A Organizational Funds B Personal C U.S. Government Funds D U.S. Government Property E Privately Owned F Foreign Government Funds G Foreign Government Property	A Loss B Found C Recovered D Damaged

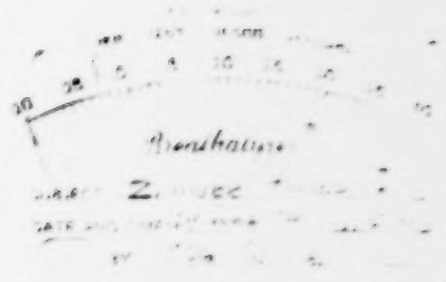
TERMINAL DIGIT

DA FORM 1 JAN 74 3975 THIS FORM TOGETHER WITH DA FORM [illegible] REPLACES DA FORM 3975, NOV 72 AND DA FORM [illegible] 1 NOV 72 WHICH ARE OBSOLETE

On 24 June 1974, at approx 0055 hrs, the subject was observed operating a 1973 Ford (LTD) white/blue , Minn Lic [redacted] in a hazardous manner on Missouri Ave. The subject's vehicle was stopped at Mo Ave and First St and upon conversing with the subject an odor of alcohol was detected on the subject's breath. The subject was apprehended, advised of his legal rights against self- incrimination, and of the Implied Consent Law, and was transported to the PMD for further disposition. A B/A test was administered at the PMD, the results were [redacted] .08 %.

Commander may take no action on traffic offenses, action to be taken by US Magistrate [illegible]

Commander's attention is invited to the requirements of AR 600-31 !!!!!!!



BREATHALYZER OPERATIONAL CHECK LIST

V

PREPARATION

PURGE

ANALYSIS

Record answer, disposal of test ample. TURN CONTROL KNOB to OFF

VIOLATION

NOTICE — UNITED STATES DISTRICT COURT

VIOLATION CHARGED

CHARGE AGAINST OWNER OR THE VEHICLE AND/OR

AS46793

SWORN STATEMENT

For use of this form, see AR 190-30; the proponent agency is Office of The Provost Marshal General.

LOCATION	DATE	TIME	FILE NUMBER
PMO	24 June 74	0055 hrs	
LAST NAME, FIRST NAME, MIDDLE NAME	SOCIAL SECURITY NUMBER		GRADE/STATUS
Boyd Dewey Al Hunter	[redacted]-72-9745		E-4
ORGANIZATION OR ADDRESS	463rd MP Co		

Pvt Boyd, Dewey Al H. WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

At approx 0055 hrs I pulled a white over-Blue Ford (LTD) over for swaying from side to side at this time I smelled a strong odor of Alcohol on Subj Breath. Subj was then appr and Trans to PMO DWB

End of Statement

DWB

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 1 PAGES
	DWB	

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ___, TAKEN AT ___, DATED ___, CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 1 JUL 72 2823 SUPERSEDES DA FORM 2823, 1 JAN 69, WHICH WILL BE USED.

APPENDIX E

VERNON'S ANNOTATED MISSOURI STATUTES

Section 304.010

304.010. Manner of operation of motor vehicles—speed limits

1. Every person operating a motor vehicle on the highways of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person and shall exercise the highest degree of care.

2. Except as otherwise provided by law no truck registered for a gross weight of more than nine thousand pounds shall be operated at any time in excess of sixty miles per hour, and no other vehicle shall be operated in excess of:

(1) Seventy miles per hour on any divided highway designated and marked as a federal route or any state-maintained highway designated as suitable for and marked by the state highway commission with appropriate speed limit signs, or, when lighted lamps are not required by law, on any other highway designated and marked as a federal route;

(2) Sixty-five miles per hour on any undivided highway designated and marked as a federal route or any state-maintained highway designated as suitable for and marked by the state highway commission with appropriate speed limit signs when lighted lamps are required by law;

(4) Sixty miles per hour on any other road or highway in the state when lighted lamps are required by law.

3. In any city, town or village where the speed limit is not set by local authority, no vehicle shall be operated at a speed in excess of forty-five miles per hour, except as provided in section 304.012. All ordinances of cities, towns or villages regulating the speed of vehicles on major state highways shall be designed to expedite the flow of traffic thereon to the extent consistent with public safety.

4. On any divided highway designated as part of the federal interstate system, no vehicle shall be operated at a speed of less than forty miles per hour, except when a slower speed is required for safe operation of the vehicle because of weather or other special conditions.

5. The county court of any county of the second class containing one hundred twenty-five thousand or more inhabitants or a county of the second class containing a state university may set a speed limit on any county road not within the limits of any incorporated city, town or village, lower than that otherwise provided in this section where the condition of the road or nature of the area requires a lower speed. The Court shall cause copies of any order establishing a speed limit on a county road to be sent to the chief engineer of the state highway department and the superintendent of the state highway patrol. After the roads have been properly marked by signs indicating the speed limits set by the county court, the speed limits shall be effective as those provided in this section.

6. The limits on speeds set by this section do not apply to the operation of any emergency vehicle as defined in section 304.-022. Nothing in subsection 2 and 3 shall make the speeds prescribed therein lawful in a situation that requires lower speed for compliance with the basic rule declared in subsection 1

7. Any person violating this section is guilty of a misdemeanor.

8. Violation of the provisions of this section specifying speed limitations shall not be construed to relieve the parties in any civil action on any claim or counterclaim from the burden of proving negligence or contributory negligence as the proximate cause of an accident or as the defense to a negligence action.

(R.S. 1939 § 8383; L. 1957 p. 631 § 1; L. 1965 p. 594 § 1; L. 1965 p. 95 § 1; L. 1969 p. 417 § 1)

Supreme Court, U. S.
FILED
JUN 12 1975
MICHAEL RODAK, JR., CLERK

No. 74-1265

In the Supreme Court of the United States

OCTOBER TERM, 1974

ALLEN J. ZIMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the magistrate did not comply with Rule 11, Fed. R. Crim. P., in accepting his plea of guilty.

Petitioner pleaded guilty before a magistrate in the United States District Court for the Western District of Missouri to a charge of careless and imprudent driving within a military reservation, in violation of 18 U.S.C. 13 and §304.010 of Vernon's Ann. Mo. Stat. He was convicted and sentenced to a fine of $300 and to imprisonment for twenty days. The sentence of imprisonment was suspended and petitioner was placed on probation for three months, with a condition to insure payment of the fine within a specified period. The district court affirmed with an opinion (Pet. App. B). The court of appeals affirmed without opinion (Pet. App. A).

Petitioner, represented by retained counsel, waived his right to a jury trial and to a trial before the district court and consented, after a full explanation of his rights, to a trial before the magistrate (Pet. App. D 7-9). After the information had been read to him, petitioner stated that he understood the charges. The magistrate told him that the maximum punishment was a fine of $1,000, or one year's imprisonment, or both. Petitioner stated that no threats or promises had been made to induce his plea; that he understood he had a right to a full trial and that his guilty plea waived that right; and that on June 24, 1974, he operated a motor vehicle in a careless and imprudent manner by weaving back and forth across a designated center line of the public road on which he was traveling (Pet. App. D 9-10). The magistrate accepted his guilty plea. Petitioner waived a presentence investigation and his right of allocution, counsel for both parties declined to make any statement, and the magistrate thereupon imposed sentence (Pet. App. D 10).

In affirming, the district court held that petitioner was fully advised of the nature of the charge and the consequences of his plea, that the plea was supported by a factual basis, and that the sentence imposed did not constitute an abuse of discretion (Pet. App. B).

1. Petitioner claims that his guilty plea was improperly induced in light of his attorney's advice "to plead to the reduced charge as the fine would probably not exceed $50"[1] and the misstatement by the magistrate that the maximum punishment he faced was a $1,000 fine and/or one year's imprisonment. In fact the maximum punishment under Missouri law was a $500 fine and/or one year's imprisonment (Pet. 5-6).

[1]Apparently petitioner had originally been charged with drunken driving (Pet. 5).

Disappointed hopes as to what the sentence might be, based on the estimate of counsel, furnish no ground for setting aside a sentence. *Wheeler* v. *United States*, 468 F.2d 244, 245 (C.A. 9); *Swanson* v. *United States*, 304 F.2d 865 (C.A. 8); *Domenica* v. *United States*, 292 F.2d 483 (C.A. 1). Nor was the magistrate's overstatement of the maximum fine reversible error. The purpose of the requirement that the court inform a defendant of the penalties he faces is to forewarn him of all possible consequences arising from a guilty plea so that he will proceed with caution before waiving his right further to contest his guilt. Overstating the maximum fine could only have increased petitioner's caution. Cf. *Limon-Gonzalez* v. *United States*, 499 F.2d 936, 937 (C.A. 5); *United States* v. *Woodall*, 438 F.2d 1317 (C.A. 5), certiorari denied, 403 U.S. 933. As the fine imposed was well within either limit, any error was harmless beyond a reasonable doubt.

2. Petitioner also urges that the record fails to show a factual basis for the guilty plea inasmuch as neither the arresting officer's report nor the Military Police report described the road on which petitioner swayed back and forth or indicated whether danger to life, limb or property was caused (Pet. 11) (§304.010, Vernon's Ann. Mo. Stat.). Petitioner's own statement to the magistrate that he was weaving back and forth across the center line, however, and the evidence that he was driving under the influence of liquor,[2] was sufficient to establish the elements of the offense and a factual basis for the plea of guilty. Petitioner's reply to the court's inquiry attested to his understanding of the charge. Cf. *McCarthy* v. *United States*, 394 U.S. 459, 471. The plea of guilty was properly accepted.

[2]In a sworn statement, a Fort Leonard Wood military policeman attested that after stopping petitioner's car he smelled a strong odor of alcohol on petitioner's breath. A Breathalizer test showed .08% blood alcohol (Pet. App. D 14-15).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.